United Nations CCPR/C/124/D/2441/2014

International Covenant on Civil and Political Rights

Distr.: General
29 November 2018

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2441/2014*, **

Communication submitted by:	Berik Zhagiparov (represented by counsel, Anara Ibrayeva)
Alleged victim:	The author
State party:	Kazakhstan
Dates of communication:	12 June 2014 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 3 July 2012 (not issued in document form)
Date of adoption of Views:	25 October 2018
Subject matter:	Sanction for participating in a peaceful assembly
Procedural issues:	Exhaustion of domestic remedies; abuse of the right of submission
Substantive issues:	Arbitrary detention; freedom of expression; freedom of assembly
Articles of the Covenant:	9, 14, 19 and 21, read in conjunction with article 2
Articles of the Optional Protocol:	1, 2, 3 and 5 (2) (b)

1. The author of the communication is Berik Zhagiparov, a national of Kazakhstan born in 1978. He claims that the State party has violated his rights under articles 9, 14, 19 and 21 of the Covenant. The Optional Protocol entered into force for Kazakhstan on 24 January 2006. The author is represented by counsel, Anara Ibrayeva.

* Adopted by the Committee at its 124th session (8 October–2 November 2018).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany, Margo Waterval and Andreas Zimmermann.

GE.18-20531(E)

1820531

Please recycle

The facts as submitted by the author

2.1 The author was the editor of the regional newspaper *Molodezhnaya Gazeta*, which had its own website, www.mgazeta.kz. The newspaper sought to protect the rights and interests of the local population in the city of Zhezkazgan and of the workers at the largest industrial plant in the city, which is owned by Kazakhmys Corporation. The author submits that, on 16 March 2012, the chairman of the board of directors of Kazakhmys filed a complaint with the regional Committee for National Security, claiming that material published in the newspaper and on its website was causing "social unrest" in the region. As a result of this complaint, the author was questioned by the Committee for National Security. On 17 January 2013, the Ministry of Culture and Information withdrew the newspaper's licence. On 26 March 2013, at the request of the Zhezkazgan City Prosecutor's Office, the Zhezkazgan City Court suspended public access to the website for three months. Although the author appealed the suspension on 4 April 2013, the website stopped being physically accessible on 10 April 2013, which was before the court decision even entered into force. The author's appeals were denied by the Karaganda Regional Court on 17 May 2013, and by the cassation collegium of the same court on 10 July 2013.

2.2 Before the newspaper's suspension, between 22 January and 7 February 2013, several articles were published on the website inviting readers to attend a rally on 9 February 2013, at which Kazakhmys workers were to protest against their working conditions. The rally was organized by the head of a local non-governmental organization (NGO), Ms. Seydakhmetova, who on 22 January 2013 submitted an application to conduct a rally to the Zhezkazgan mayor's office. On 9 February 2013, the author participated in the rally near the offices of Kazakhmys on Metallurg Square. On 10 February 2013, he was detained by the police for organizing the rally and was held overnight at the police station. On 11 February 2013, the Zhezkazgan Administrative Court found the author guilty of organizing an unsanctioned rally and sentenced him to seven days of administrative arrest, even though the prosecutor at the hearing had asked for a six-day sentence. On 12 February 2013, the author appealed the sentence to the Karaganda Regional Court. On 5 March 2013, the Karaganda Regional Court confirmed the decision of the lower court. On 10 July 2013, the Zhezkazgan City Prosecutor denied the author's appeal for a supervisory review. On 2 August 2013, the author submitted an appeal for a supervisory review to the General Prosecutor's Office. However, this appeal was transferred to the Karaganda Regional Prosecutor's Office. Receiving no response, the author submitted another appeal for a supervisory review to the Karaganda Regional Prosecutor's Office on 3 December 2013, which was denied on 10 January 2014.

2.3 On 23 May 2013, the author attended a public gathering on the issue of mortgage rights near Government House in Astana. The author claims that he was covering the gathering as a journalist and showed his professional identification to the police, but he was detained and taken to the local police station. Later on the same day, the Astana Interdistrict Administrative Court found the author guilty of participating in an unsanctioned public gathering and sentenced him to 15 days of administrative arrest. On 25 May 2013, the Astana City Court denied the author's appeal and upheld the decision of the lower court. On 18 July 2013, the author submitted an appeal for a supervisory review to the Astana City Prosecutor's Office, which was denied on 23 August 2013. On 11 February 2014, the author submitted an appeal for a supervisory review of both of his administrative arrests to the General Prosecutor's Office. On 2 April 2014, his appeal was denied by the Deputy General Prosecutor. The author submits that he has exhausted all available domestic remedies.

The complaint

3.1 The author submits that the State party has violated his right to seek, receive and impart information under article 19 of the Covenant, because he was sentenced to a total of 22 days of administrative arrest for having performed his work as a journalist.

3.2 The author further submits that, as he was arrested for exercising his rights protected by the Covenant, both of his detentions were arbitrary in nature and violated his rights under article 9 of the Covenant.

3.3 The author claims that he was denied access to effective appeal, in violation of article 14 of the Covenant, because his administrative sentences were carried out immediately, before they could even be reviewed by higher courts. He submits that, according to article 697 (2) of the Code of Administrative Offences, an administrative court decision must be executed after it enters into force, which is after 10 days or, if it is appealed, after a higher court hears the appeal. However, paragraph 3 of the same article states that persons sentenced to administrative arrest start serving their sentence immediately. Article 675 of the code states that appealing an administrative arrest does not stay the execution of a court judgment. The author submits that, in his first administrative case, his appeal was only heard three weeks after it was filed, although article 660 of the code requires that an appeal in a case where the defendant is sentenced to administrative arrest must be considered within 24 hours of its being filed. The author further submits that he has already served his sentence.

3.4 The author claims that his rights under article 21 of the Covenant were violated, as he was arrested for his participation in a peaceful protest.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 6 January 2015, the State party submitted its own summary of the facts. It submits that, on 22 January 2013, the chairperson of the local NGO Elim-ay, Ms. Seydakhmetova, notified the Mayor of Zhezkazgan that she planned to conduct a rally on 9 February 2013 on Metallurg Square. On the same day, an article was published on the website headed "Everybody to the rally", with a video calling on the public to attend the unsanctioned rally. On 29 January 2013, another article was published on the website by the author, in which he said that he planned not only to cover the upcoming rally in the media, but also to play an active part in it. On 30 January 2013, a further article and a video were posted on the website, calling for a rally. On 4 February 2013, the Mayor of Zhezkazgan officially notified Ms. Seydakhmetova of the steps she needed to take to obtain approval for the rally. Despite this, on 7 February 2013, the website featured another post calling on the public to attend the unsanctioned rally. On 9 February 2013, the author participated in the unsanctioned rally that took place on Metallurg Sqaure.

4.2 The State party recognizes that the right of peaceful assembly is a democratic feature of political activity for its citizens, and the legislation of Kazakhstan guarantees the enjoyment and protection of this inalienble human right. Such guarantees are established in the Consitution of Kazakhstan and in the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Meetings, Marches, Pickets and Demonstrations. However, the enjoyment of rights by one group of citizens should not infringe on the rights of other persons, and in some cases certain restrictions can be imposed for the sake of the safety of right holders themselves.

4.3 In accordance with article 21 of the Covenant, any restriction must be in conformity with the law and must be necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. To ensure the protection of rights and freedoms of other persons, as well as public safety, the normal functioning of transport and the preservation of infrastructure, certain places may be designated as places where members of the public may conduct non-governmental events of a public nature. The State party submits that, in almost every city and region in Kazakhstan, such places are designated by local administrations. Meanwhile, in any developed democratic country, the freedom of peaceful assembly is restricted by special laws that lay out the conditions in which such assemblies may take place, and in many countries such laws are much stricter than in Kazakhstan. For example, to conduct a rally in New York in the United States of America, one has to submit an application 45 days prior to the event, showing the route the participants intend to take, and in cases where such an application is not made, rally participants can be arrested. In France, the authorities can disperse crowds after two warnings, and if the demonstration continues, its organizers can be imprisoned for up to six months. In the United Kingdom of Great Britain and Northern Ireland, street demonstrations and rallies can be conducted only after receiving official approval from the police. In Germany, any mass event must be authorized by the authorities. Therefore, the

State party submits that its regulation of public assemblies is in line with the norms of international law, the Covenant and existing practices in other democratically developed countries.

4.4 With regard to the closure of the newspaper's website, the State party notes that, in accordance with article 13, paragraph 1 of the Mass Media Act, a media outlet can be suspended or closed by its owner or by the courts. A violation of the Law on the Procedure for Organizing and Holding Peaceful Assemblies, Meetings, Marches, Pickets and Demonstrations can result in the suspension of a media outlet. As the website's readers had been invited to commit an administrative violation (participation in the unsanctioned rally), on 18 February 2013 the Zhezkazgan City Prosecutor asked the court to suspend it. The Zhezkazgan City Court agreed with the position of the prosecutor's office and decided to suspend the website for three months. Therefore, the author's claim of a violation of article 19 of the Covenant has no legal basis, because the court found that the author's articles did not contain an opinion on a certain issue, but rather contained calls for a specific action, namely participation in the unsanctioned rally.

4.5 On 11 February 2013, the author was found guilty of violating article 373 (3) of the Code of Administrative Offences and was sentenced to seven days of administrative arrest. On 21 May 2013, the author participated in another unsanctioned gathering near Government House in Astana. Since he committed this offence within a year of his first administrative offence, he was found guilty of violating article 373 (3) of the Code of Administrative Offences and was sentenced to 15 days of administrative arrest. On 2 April 2014, the Deputy General Prosecutor denied the author's appeal for a supervisory review. In accordance with article 674 (1) of the Code of Administrative Offences, the General Prosecutor, his deputies and regional prosecutors have the right to issue a protest against court decisions that have entered into force. Since the author's appeal was denied by the Deputy General Prosecutor, he had the right, in accordance with the law, to make a further appeal to the General Prosecutor for a supervisory review, which he has not done. Thus, the author has not exhausted all domestic remedies in this case.

4.6 With regard to the author's claim of a violation of article 9 of the Covenant, the State party considers it unsubstantiated because, according to article 16 (2) of the Consitution of Kazakhstan, arrest and detention can only take place if provided by law and sanctioned by a court, while arrestees have the right to appeal. Article 373 (3) of the Code of Administrative Offences provides for a sanction of an administrative fine or administrative arrest of up to 15 days for the violation of the legislation on organizing and holding peaceful assemblies. In accordance with article 541 (1) of the Code of Administrative Offences, cases under article 373 are tried by judges from a specialized district or equivalent administrative courts. Therefore, the author was brought before a judge and sanctioned with administrative arrest under the Code of Administrative Offences, in conformity with article 9 (3) of the Covenant.

4.7 The Code of Administrative Offences provides for an appeal in administrative cases. According to article 655 of the Code, any decision of an administrative court may be appealed by a defendant, victim, counsel or legal representative. A prosecutor may also issue a protest against such a decision. To appeal a court decision that has already entered into force, the above-mentioned persons could submit an appeal to the prosecutor, who in turn has the right to file a protest to the Supreme Court of Kazakhstan. The State party notes that the new Code of Administrative Offences now allows for a defendant to appeal directly to the cassation court once the court decision has entered into force.[1] Thus, the administrative legislation of Kazakhstan is in compliance with article 9 (4) of the Covenant.

4.8 According to articles 677 and 678 (1) of the Code of Administrative Offences, if a case against a person is closed under article 580 of the code, that person is considered innocent and shall be compensated for any damages caused by any unlawful detention or administrative arrest, in accordance with article 9 (5) of the Covenant.

4.9 The State party submits that the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Meetings, Marches, Pickets and Demonstrations establishes several

[1] The new Code of Administrative Offences of Kazakhstan entered into force on 1 January 2015.

restrictions in the interests of public safety, public order, the protection of public health and morals and the protection of the rights and freedoms of others. In particular, article 5 of the act provides for the right to hold public assemblies in accordance with the goals stated in the organizers' application, within a predetermined time and at designated places. These requirements were violated by the author, as a result of which he was found guilty of administrative offences by the Zhezkazgan and Astana courts. In the first case, the author organized an unsanctioned rally on 9 February 2013 on Metallurg Square in Zhezkazgan, and called upon members of the public to attend the rally through Internet posts in which the author emphasized his role as the organizer of the rally. In the second case, the author participated in an unsanctioned gathering near Government House in Astana. The State party asserts that the author's claim of violation of his rights under article 21 is not substantiated, because no restrictions were placed on the exercise of these rights other than those imposed in conformity with the law.

4.10 The State party further submits that the author's allegations of violation of his rights under article 14 are not substantiated because he has not shown which specific legislation has been violated. The State party submits that article 14 can only be applied in criminal cases, while the author was charged with an administrative offence. Based on the above, the State party submits that it is meeting all of the requirements set under articles 2, 9, 14, 19 and 21 of the Covenant, and the author's communication should be ruled inadmissible for its lack of substantiation.

Author's comments on the State party's observations

5.1 In a letter dated 23 February 2015, the author responded to the observations of the State party. The author notes that the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Meetings, Marches, Pickets and Demonstrations does not contain the term "unsanctioned", while the State party requires a permit to be obtained before any peaceful assembly may be held. The author suggests that the State party's position is that the author could distribute information about the rally only until 4 February 2013, when the authorities sent a "notification" to Ms. Seydakhmetova about steps she needed to take to obtain approval for the rally. Any articles and posts published after this date could be considered to be "in violation of the law". However, under the law of Kazakhstan, a "notification" cannot be considered to be a "prohibition" to hold a rally. According to article 4 of the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Meetings, Marches, Pickets and Demonstrations, such a prohibition can only be issued in the form of a "decree", and no decree was issued to Ms. Seydakhmetova. Thus, all of the author's Internet articles and posts are in conformity with the legislation of Kazakhstan. The author notes that the law does not prevent anyone from distributing information, expressing an opinion or inviting others to public gatherings.

5.2 The author rejects the State party's assertion that he organized the rally on 9 February 2013, and submits that the rally was organized by Ms. Seydakhmetova, who submitted the application to the Zhezkazgan city administration. The city administration's notification was also addressed to Ms. Seyzakhmetova, which confirms that she was the organizer of the rally. The author, acting as a journalist, published articles in which he expressed the importance of workers' rights and he later participated in the rally, but he was not the organizer of the rally. The author further submits that he attended the public gathering of 23 May 2013 in Astana also as a journalist, because he needed first-hand information from the event for his publication. Therefore, by arresting and detaining him, the State party restricted his right to freedom of expression, including his right as a journalist to seek and receive information.

5.3 The author notes that, as a journalist, he has the right to be present at places of emergency, protests and demonstrations and other events at which public and individual interests are expressed.[2] According to paragraph 19 of the Committee's general comment No. 34 (2011) on the freedoms of opinion and expression, States parties should make every effort to ensure easy, prompt, effective and practical access to information of public interest. Instead, the author was detained and sentenced to 15 days of detention for covering the

[2] Art. 20, para. 4, of the Mass Media Act.

peaceful assembly of 23 May 2013 in Astana, which was an event of public interest. The author makes reference to the case of *Toregozhina v. Kazakhstan*, in which the Committee held that any restriction on the freedom of expression must not be overbroad in nature, that is, it must be the least intrusive among the measures that might achieve the relevant protective function and proportionate to the interest whose protection is sought.[3] The author submits that, contrary to the above, he was punished with 22 days of detention for exercising his rights to freedom of expression and peaceful assembly.

5.4 With regard to the State party's assertion that the author has not exhausted all available domestic remedies in his administrative cases, the author submits that his appeals for a supervisory review were denied by the Deputy General Prosecutor. The reasons given for denying the author's application for appeal include the statement that "there was no legal basis for review of the court decisions". The author asserts that any further appeals to the General Prosecutor's Office would have no reasonable prospects of success, because his appeal has already been denied once by the same office. Thus, he claims that the State party has denied him an effective domestic remedy and has violated his rights under article 2 of the Covenant.

5.5 The author reiterates all of his original claims, and asks the Committee to find violation of articles 2, 9, 14, 19 and 21 of the Covenant and to recommend that the State party review his two periods of administrative arrest, provide him with adequate compensation, including non-pecuniary damages and rehabilitation for 22 days of detention, make legislative amendments that would allow for an appeal to be heard before a sentence of administrative arrest is enforced and ensure that all persons, not just journalists, can enjoy their rights under articles 19 and 21 of the Covenant without fear or restriction.

State party's additional observations on admissibility and the merits

6.1 In a note verbale dated 8 April 2015, the State party submitted additional information on the merits of the communication. The State party notes that, after the author's first article on the website calling for attendance at the rally, the Zhezkazgan City Prosecutor's Office officially warned the author and Ms. Seydakhmetova to abstain from violating the law. However, after receiving this warning, the author published another article in which he declared that he intended not only to cover the rally but also to take an active part in it. On 7 February 2013, after the Mayor of Zhezkazgan officially notified Ms. Seydakhmetova that it would be unlawful to carry out the rally near the offices of Kazakhmys, the author published another article on the website inviting members of the public to attend the rally. The article stated that he was the organizer of the event, and that he did not intend to ask permission from the mayor to hold this rally. The State party notes that neither the author nor Ms. Seydakhmetova officially submitted an application to obtain permission to hold the rally on 9 February 2013, as required by the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Meetings, Marches, Pickets and Demonstrations.

6.2 The State party further notes that, between 2011 and 2014, the State authorities officially authorized 197 peaceful assemblies in Kazakhstan. The State party considers the freedom of peaceful assembly to be a democratic institution that requires continuous development, and the Constitution of Kazakhstan guarantees the right to peaceful assembly and protest. It reiterates that, in order to ensure the protection of rights and freedoms of other people, as well as public safety, the normal functioning of transport and the preservation of infrastructure, certain places may be designated as places where members of the public may conduct non-governmental events of a public nature and that, in almost every city and region in Kazakhstan, such places are designated by local administrations.

6.3 The State party reiterates that the author's allegations under articles 9 and 14 of the Covenant are baseless, because his trials were held in conformity with the requirements of article 14 and his administrative arrest was sanctioned by the court. The State party further reiterates that the Code of Administrative Offences provides for the submission of an appeal in cases where a defendant does not agree with the decision of the first instance

[3] *Toregozhina v. Kazakhstan* (CCPR/C/112/D/2137/2012), para. 7.4.

court, which satisfies the requirements of article 14 (5) of the Covenant, and that the new Code of Administrative Offences even allows for a defendant to appeal directly to the cassation court after a court decision has entered into force.

Author's comments on the State party's additional observations

7.1 In a letter dated 23 October 2015, the author responded to the additional observations of the State party. The author submits that the law that provides for the detention and sentencing of participants in unsanctioned public assemblies to a fine or a period of administrative arrest is in violation of articles 19 and 21 of the Covenant, because it threatens the existence of these rights. He notes that, since the mayor's office did not issue a proper decree denying Ms. Seydakhmetova's application for a rally as required by the law, the rally could not be considered as "unsanctioned". Therefore, the author's arrest and detention were arbitrary and unlawful.

7.2 With regard to the statistics submitted by the State party about the number of authorized peaceful assemblies, the author notes that the State party's national report for the 2014 universal periodic review (A/HRC/WG.6/20/KAZ/1) states that 1,222 manifestations of various types were held in Kazakhstan between 2010 and 2013, 660 of which were classified as "unsanctioned". He further notes that the 2014 report of the Commission on Human Rights of Kazakhstan states that, between 2012 and 2014, there were 497 public events, 324 of which were unsanctioned. The author asserts that local administrations often exceed the powers granted to them under article 10 of the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Meetings, Marches, Pickets and Demonstrations as, although the law allows local administrations to regulate the procedure (order) of a peaceful assembly, it does not empower administrators to regulate the purpose, time, place or number of participants of such assemblies. The author makes reference to the research conducted by a local NGO in 2015, which found that only 3 out of 154 decrees issued by local administrations in one region in Kazakhstan were found not to have violated the law. In the cases of these decrees, local administrators decided where the public assemblies should be held.

7.3 The author reiterates his previous arguments that, as a journalist, he has a right to be at any peaceful assemblies as part of his professional duties, and that, due to the fact that his administrative sentences were carried out immediately without giving him an opportunity to appeal them before his periods of administrative arrest began, the State party violated his rights under articles 9 and 14.

Further observations by the State party on admissibility

8.1 In a note verbale dated 20 January 2016, the State party submitted its further observations on the admissibility of the communication. The State party notes that the communication is not signed by the author himself, but rather by Anara Ibrayeva, who represents the local NGO Kadir-kasiet as a legal entity in her capacity as its head. Meanwhile, article 1 of the Optional Protocol to the Covenant states that the Committee can receive and consider communications submitted by individuals only. The State party further notes that, even if Ms. Ibrayeva is to be considered a lawful representative of the author, her power of attorney expired one year after she filed the communication, because the Civil Code of Kazakhstan states that any power of attorney without an expiration date expires one year after it is issued. As both the author and Ms. Ibrayeva are nationals of Kazakhstan, they are subject to the legislation of Kazakhstan.

8.2 The State party has questioned the reasons why the author was unable to submit the communication personally. It notes that Ms. Ibrayeva is not a professional lawyer, and while the author mentions in his power of attorney that he lives in a rural area far from the capital, where the mail service is not reliable, he could have easily submitted the communication personally by email. Based on the above, the State party considers that the author has not legally proved his intention to submit this communication, and doubts that the author does in fact believe that his rights under the Covenant have been violated. Therefore, the State party asserts that the communication is inadmissible pursuant to articles 1 and 3 of the Optional Protocol to the Covenant and to rule 96 (a) and (b) of the Committee's rules of procedure.

8.3 The State party further notes that neither when the website was suspended nor in his administrative cases did the author submit an appeal for a supervisory review to the General Prosecutor. The State party makes reference to the case of *T.K. v. France*, in which the Committee held that mere doubts about the effectiveness of domestic remedies do not absolve an author from pursuing them.[4] The State party refers to a domestic case, *Filatova and Kuzmintsev*, in which an appeal for a supervisory review to the General Prosecutor resulted in a new court decision in favour of the defendants and the full restoration of their rights and freedoms. Therefore, the communication should be considered inadmissible due to the author's failure to exhaust domestic remedies.

Author's comments on the State party's further observations on admissibility

9.1 In a letter dated 30 January 2016, the author responded to the State party's observations on the admissibility of the communication. The author notes that the Committee's rules of procedure are not subject to the legislation of Kazakhstan. Since there was no way to predict how long it would take for the communication to be considered by the Committee, the author did not assign an expiry date on the power of attorney. The author submits that Ms. Ibrayeva is a professional lawyer, holds an advocate's licence and a Doctor of Philosophy (PhD) degree in law. He further submits that, by making such baseless allegations, the State party is intending to delay the consideration of the communication and to place an additional financial burden on the author. The author submits a handwritten letter reaffirming the delegation of his powers to Ms. Ibrayeva to submit correspondence to the Committee on his behalf, and notes that he is ready to personally sign each submission, if required by the Committee.

9.2 With regard to the exhaustion of domestic remedies, the author notes that, in 2012, access to more than 40 independent media websites was suspended in Kazakhstan at the request of prosecutors, and access to more than 30 such websites was suspended in 2013. However, there has been no case in Kazakhstan where access to a website was restored as a result of a supervisory review. The author notes that access to the newspaper's website was suspended even before the court's decision entered into force. The author submits that he appealed the suspension to second and third instance (cassation) courts and submitted six different complaints to various levels of the General Prosecutor's Office, including to the General Prosecutor. However, all of the replies were of a similar nature, albeit they were signed by different officials. The author argues that the State party has not shown how his seventh complaint to the General Prosecutor's Office could have provided him with an effective remedy.

9.3 The author notes that the case of *T.K. v. France* is not relevant to his case, because the circumstances surrounding the case differ considerably. T.K.'s appeal was not registered by the court, while in the present case the author's appeals were heard by second and third instance courts. As for the domestic case of *Filatova and Kuzmintsev*, an appeal to the General Prosecutor for supervisory review was granted in 2015, two years after the author's case, and only after Ms. Filatova and Mr. Kuzmintsev submitted a communication to the Human Rights Committee. Therefore, the author submits that his communication meets all admissibility criteria.

Further observations by the State party on admissibility and the merits

10.1 By notes verbales dated 11 March 2016, 29 April 2016 and 29 June 2016, the State party rejects the author's assertion that the Civil Code of Kazakhstan does not apply to the Committee's rules of procedure, and notes that article 2 (3) (b) of the Covenant directs each State party to ensure that any person claiming a remedy shall have his or her right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy. Further, the State party refers to paragraph 15 of general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which states that the Committee attaches importance to States parties' establishing appropriate judicial and administrative mechanisms for addressing

[4] Human Rights Committee, *T.K. v. France*, communication No. 220/1987.

claims of rights violations under domestic law, and that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, the application of comparable constitutional or other provisions of law or the interpretive effect of the Covenant in the application of national law. Therefore, the State party submits that it can rely on the Covenant and on national legislation to make legal arguments. The State party notes that, since the author in his previous submission provided the Committee with a new power of attorney for Ms. Ibrayeva, it proves the State party's position that the original power of attorney issued in 2014 had expired after one year.

10.2 With regard to Ms. Ibrayeva's powers to represent the interests of the author, the State party reiterates that, since the author is not a member of Ms. Ibrayeva's NGO and his articles were not related to the work of the NGO, she cannot be considered his representative. The communication is thus inadmissible pursuant to rule 96 (b) of the Committee's rules of procedure.

10.3 The State party does not consider the author's argument that the Government of Kazakhstan annually suspends access to independent mass media outlets to be relevant to the present communication. With regard to the case of *Filatova and Kuzmintsev*, the State party rejects the author's assertion that the General Prosecutor granted the author's appeal for a supervisory review because of the communication to the Human Rights Committee. It notes that there have been other cases in Kazakhstan where the General Prosecutor's Office was able to provide effective domestic remedies in line with the principles of reasonableness and proportionality. For example, in the case of *Mustafaev et al.*, a protest was submitted by the General Prosecutor's Office, the court's sentence of administrative arrest was subsequently quashed and a new sentence of an administrative fine was imposed.

10.4 The State party reiterates that *T.K. v. France* is relevant to the present case, and notes that there are other cases decided by the Committee where non-exhaustion of effective domestic remedies resulted in a decision of inadmissibility. For example, in *T.J. v. Lithuania*, the Committee found the communication inadmissible because the author did not advance any reasons as to why he did not complain about the length of proceedings during his criminal proceedings, including at the appeal and cassation appeal stages, as well as because of his failure to pursue the remedy in respect to these claims later on, before the ordinary courts, despite numerous examples of domestic case law providing opportunities to submit such a claim before the national courts.[5] Based on the above, the State party requests the Committee to find the communication inadmissible due to non-substantiation and failure to exhaust domestic remedies.

Author's comments on the State party's further observations on admissibility and the merits

11.1 In letters dated 30 March 2016 and 29 July 2016, the author responded to the State party's further observations on admissibility and the merits of the communication. The author notes the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, on his mission to Kazakhstan in 2015, which states that the State party's requirements to seek prior permission from local authorities at least 10 days before the date of a gathering do not comply with international standards, which provide that no authorization should be required to assemble peacefully and that everyone has the right to freedom of peaceful assembly and of association.[6]

11.2 The author further notes that the case of *Mustafaev et al.* shows that, while the State party is willing to use the principles of reasonableness and proportionality of restriction with regard to certain people, these principles do not extend to cases involving human rights defenders such as the author, who was twice tried for participating in unsanctioned gatherings. Unlike Mr. Mustafaev, the author was sentenced to various terms of detention in both instances.

[5] *T.J. v. Lithuania* (CCPR/C/107/D/1911/2009), para. 6.3.

[6] A/HRC/29/25/Add.2, para. 52.

11.3 The author notes that his case is one of many in which the State party has violated the rights of journalists. For instance, on 21 May 2016, nine journalists from one of the independent media outlets, Radio Free Europe Kazakhstan, were detained in four different cities while covering nationwide protests in Kazakhstan. The author makes reference to reports by several local NGOs, which have reported numerous violations of the rights of persons while they have been in detention, similar to those that happened in the author's case.[7]

11.4 The author notes that, in paragraph 45 of its general comment No. 34, the Committee states that it is normally incompatible with article 19 (3) of the Covenant to restrict the freedom of journalists and others who seek to exercise their freedom of expression, such as persons who wish to travel to human rights-related meetings.

11.5 With regard to the suspension of access to the newspaper's website, the author reiterates that this was done unlawfully, before the court decision even entered into force. The author claims that the suspension was in violation of paragraph 43 of general comment No. 34, and was ordered because he exercised his rights by inviting readers to attend the rally.

Issues and proceedings before the Committee

Considerations of admissibility

12.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

12.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

12.3 The Committee notes the State party's argument that the author has failed to file a supervisory review appeal to the Supreme Court through the General Prosecutor's Office. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office requesting a review of court decisions that have taken effect does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.[8] In the present case, the Committee notes the State party's reference to two cases in which appeals to the General Prosecutor's Office resulted in the submission of protests by the General Prosecutor to the Supreme Court and subsequent changes of court sentences for defendants. The Committee also notes the author's point that, on 2 August 2013, he submitted an appeal for a supervisory review to the General Prosecutor's Office in his first administrative case, although this was transferred to the Karaganda Regional Prosecutor's Office. On 11 February 2014, the author submitted another appeal to the General Prosecutor's Office with regard to both of his periods of administrative arrest. On 2 April 2014, his appeals were denied by the Deputy General Prosecutor. The Committee considers that the State party has not demonstrated that a further supervisory review appeal to the Supreme Court through the General Prosecutor's Office would have been an effective remedy in his case. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

12.4 On the issue of the validity of the power of attorney presented by Mr. Zhagiparov, the Committee recalls that, normally, the communication should be submitted by the individual personally or by that individual's representative.[9] In the present case, Mr. Zhagiparov provided Ms. Ibrayeva with a handwritten power of attorney, clearly delegating the power to act as his representative in this case. In addition, Mr. Zhagiparov has since provided another handwritten letter, expressly and unequivocally authorizing her to

[7] See https://rus.azattyq.org/a/zaderzhania-21-maya-pravovaya-ocenka/27771698.html.

[8] *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Lozenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3; *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3; *Poplavny and Sudalenko v. Belarus* (CCPR/C/118/D/2139/2012), para. 7.3.

[9] Rule 96 (b) of the Committee's rules of procedure.

represent him before the Committee. The Committee therefore concludes that the communication was submitted to it in accordance with the rules.

12.5 The Committee considers that the author has sufficiently substantiated his claim under articles 9, 14, 19 and 21 of the Covenant, read in conjunction with article 2, for the purposes of admissibility. Accordingly, it declares this part of the communication admissible and proceeds with its consideration of the merits.

Considerations of the merits

13.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

13.2 The Committee notes the author's claim that the State party has violated his right to seek, receive and impart information and his right of peaceful assembly, because he was sentenced to 22 days of administrative arrest for having performed his work as a journalist. The Committee notes that the author was found guilty and sentenced to periods of administrative arrest on two occasions. First, he was sentenced to seven days of administrative arrest for organizing a rally in Zhezkazgan on 9 February 2013. Secondly, he was sentenced to 15 days of administrative arrest for participating in a public gathering in Astana on 23 May 2013. The Committee considers that the State party imposed limitations on the author's rights, in particular on his right to impart information and ideas of all kinds, as prescribed under article 19 (2) of the Covenant. Therefore, the Committee must determine whether the restrictions imposed on the author's rights can be justified under article 19 (3).

13.3 The Committee refers to its general comment No. 34, in which it states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and that such freedoms are essential for any society (para. 2). They constitute the foundation stone for every free and democratic society (para. 2). The Committee recalls that article 19 (3) of the Covenant allows certain restrictions but only as are provided by law and are necessary: (a) for the respect of the rights or reputations of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. Any restriction on the exercise of such freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[10] The Committee further recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.[11]

13.4 The Committee notes that the author was sanctioned for organizing and participating in unsanctioned public events based on determinations by local courts that the events had been held without prior authorization, in violation of the Act on the Procedure for Organizing and Holding Peaceful Assemblies, Meetings, Marches, Pickets and Demonstrations. The Committee also notes the author's argument that he was covering the 23 May 2013 event as a journalist and even showed his professional accreditation to the police, but was detained and taken to the local police station. The Committee further notes that the State party has not provided any explanation as to why such restrictions were justified pursuant to the conditions of necessity and proportionality set out in article 19 (3) of the Covenant, nor as to whether the penalties imposed, being 7 and 15 days of administrative arrest, were necessary, proportionate and in compliance with any of the legitimate purposes listed in this provision, even if based on law. In the absence of sufficient explanation by the State party, the Committee concludes that the rights of the author under article 19 (2), read alone and in conjunction with article 2 (3), have been violated.

[10] General comment No. 34, para. 22; *Turchenyak et al. v. Belarus* (CCPR/C/108/D/1948/2010), para. 7.7; *Korol v. Belarus* (CCPR/C/117/D/2089/2011), para. 7.3; *Poplavny and Sudalenko v. Belarus*, para. 8.3.

[11] *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3; *Poplavny and Sudalenko v. Belarus*, para. 8.3.

13.5 Regarding the author's claim under article 21 of the Covenant, the Committee similarly considers that the State party has failed to demonstrate that the restrictions imposed on the author's rights, namely the detention of the author and the sentencing of the author to 7 and 15 days of administrative arrest respectively on two occasions, were necessary in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Accordingly, the Committee concludes that the facts before it also resulted in a violation of the author's rights under article 21, read alone and in conjunction with article 2 (3) of the Covenant.

13.6 The Committee recalls that arrest or detention as punishment for the legitimate exercise of the rights guaranteed by the Covenant, including freedom of opinion and expression and freedom of assembly, is arbitrary.[12] The Committee also recalls the importance it places on the freedom of expression of journalists, and it is normally incompatible with article 19 (3) to restrict the freedom of movement of journalists within the State party. The penalization of a journalist solely for being critical of the Government or the political social system espoused by the Government can never be considered to be a necessary restriction of freedom of expression.[13] In the light of the above finding on the unjustified nature of the restrictions of the author's rights under articles 19 and 21, the Committee finds also that the deprivation of liberty to which the author was subjected was arbitrary in nature and violated his rights under article 9 (1) of the Covenant.

13.7 With regard to the author's claim under article 14 of the Covenant, the Committee notes the State party's argument that the author's allegations of violation of his rights under article 14 should be inadmissible because he has not indicated which specific norms under article 14 have been violated, and that article 14 can only be applied in criminal cases, while the author was charged with an administrative offence. The Committee notes that, on two occasions, the author was sentenced to 7 and 15 days of administrative arrest respectively for violating the laws on organizing and holding peaceful assemblies under article 373 (3) of the Code of Administrative Offences. It further notes that the legal rules infringed by the author are directed not towards a given group possessing a special status in the manner, for example, of disciplinary law, but towards anyone who, in his or her individual capacity, distributes leaflets calling for a protest. The rules proscribe conduct of a certain kind and make the resultant requirements subject to a determination of guilt and a punitive sanction. In its jurisprudence,[14] the Committee has referred to paragraph 15 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which it referred to sanctions for acts that are criminal in nature that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity. Therefore, the general character of the rules and the purpose of the penalty, being both a deterrent and punitive in nature, establish that the offence in question was, in terms of article 14 of the Covenant, criminal in nature.

13.8 The Committee notes the author's claim that his administrative sentences were carried out immediately and that he did not have an opportunity to file appeals before his periods of administrative arrest began. The Committee recalls that article 14 (5) of the Covenant provides that everyone convicted of a crime shall have the right to his or her sentence being reviewed by a higher tribunal according to law. The Committee also recalls its general comment No. 32, in which it states that the effectiveness of the right to appeal is impaired, and article 14 (5) violated, if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision.[15] The Committee notes that article 660 of the Code of Administrative Offences requires that an appeal in a case where a defendant is sentenced to administrative arrest must be considered within 24 hours after its filing. In the present case, while the author's appeal following his first administrative arrest was filed on 12 February 2013, it was heard by the Karaganda Regional Court only on 5 March 2013, 21 days after it was filed and 14 days after the author had been released having served his sentence. In these circumstances and in the absence of any additional

[12] General comment No. 35 (2014) on liberty and security of person, para. 17.

[13] General comment No. 34, paras. 42 and 45.

[14] *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), paras. 7.3–7.4.

[15] General comment No. 32, para. 49.

information from the State party, the Committee considers that the author has sufficiently demonstrated that, in failing to enforce the procedural time limits set by the Code of Administrative Offences for the consideration of appeals and hence causing a delay, the decision of the Karaganda Regional Court amounted to a violation of article 14 (3) (c) and 5 of the Covenant, read together.

14. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 9 (1), 14 (3) (c) and (5), 19 (2) and 21 of the Covenant, read alone and in conjunction with article 2 (3).

15. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide individuals whose Covenant rights have been violated with an effective remedy in the form of full reparation. Accordingly, the State party is obligated to, inter alia, review Mr. Zhagiparov's convictions and provide him with adequate compensation and appropriate measures of satisfaction. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In that regard, it should review its legislation with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.

16. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.